No. 82-1942

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

JOHN R. HOFFMAN,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

ROBERT L. WEINBERG *
LAWRENCE LUCCHINO
F. LANE HEARD III
Hill Building
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

* Counsel of Record

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TABLE OF AUTHORITIES

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1. As to whether *Cuyler v. Sullivan*, 446 U.S. 335 (1980), requires a defendant to satisfy a two-part test to establish a Sixth Amendment violation, the Brief in Opposition begs the question raised by this petition of whether there is a conflict among the circuits. The Brief in Opposition does not dispute that the trial court required evidence of an adverse effect on counsel's performance in addition to evidence of an actual conflict of interest. Nor does it dispute that there is a significant split among the circuits and state supreme courts as to whether that reading of the *Cuyler v. Sullivan* standard is correct. Thus, nothing in the Brief in Opposition de-

nies that this case provides an appropriate vehicle to resolve that split.

2. The Brief in Opposition, at 8, suggests that co-defendant Moose would have plea bargained and testified against petitioner whether or not Moose was represented by attorney Long. But this, too, begs the question, which under either interpretation of *Cuyler v. Sullivan* is whether Long actively represented conflicting interests —*i.e.*, whether he acted contrary to petitioner's interest in order to further the interest of Moose. The answer to that question does not turn on speculation as to what independent counsel for Moose might have done. The incontrovertible fact is that, while representing petitioner, Long assisted the State in procuring the key witness—Moose—*against* petitioner. Having done so, Long then failed to cross-examine Moose and, when the state solicitor exploited Long's conflict of interest by commenting on his dual representation in closing argument, failed to object. Long's ongoing representation of Moose's interests during petitioner's trial could not have been more "active."

3. The Brief in Opposition, at 9, misstates the record and the law in asserting that "petitioner was represented by other independent counsel who suffered under no conflict of interest." Petitioner chose Long as his trial counsel. The record establishes that Long initiated the idea of associating state senator William Doar for the second trial (after a change of venue to Senator Doar's county) and did so solely for the purpose of obtaining Doar's assistance in selecting a jury. TR. 1646. Petitioner did not understand that Doar would play any part in the trial and never discussed the facts of the case with him. TR. 1646. The facts simply do not support the suggestion that petitioner retained Doar as independent counsel as a response to Long's conflict of interest.

As a matter of law, moreover, Doar's retention could not eliminate the constitutional problem created by Long's

conflict. It is a basic principle that an attorney cannot remove a conflict of interest by transferring a case to another member of his firm. *Laskey v. Warner Bros. Pictures, Inc.*, 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); ABA Model Code of Professional Responsibility, DR 5-105(D). Thus, for example, in *Ross v. Heyne*, 638 F.2d 979 (7th Cir. 1980), the court held that there was an actual conflict even though the co-defendants were represented by separate counsel—because the attorneys were partners and each was privy to information about the other's client. *A fortiori*, an attorney cannot eliminate his conflict of interest by continuing to represent co-defendants and merely associating another attorney to assume a second-chair role on behalf of one defendant. *See Baty v. Balkcom*, 661 F.2d 391 (5th Cir. 1981), *cert. denied*, 456 U.S. 1011 (1982).[1]

4. Significantly, the Brief in Opposition does not dispute that: (1) the state solicitor commented on Long's conflict of interest in order to attack petitioner's credibility on the central factual question in the case and (2) the comment raises a novel and important constitutional issue. The Brief in Opposition only argues lamely that the issue was not presented to the trial court and

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[1] The facts here are even more redolent of a continuing conflict than in *Baty v. Balkcom*. There, attorney Smith represented co-defendants Baty and Miller until the eve of trial, when Smith announced that attorney Taylor would be counsel for Baty. Baty and Miller had inconsistent stories creating a conflict for any lawyer attempting to represent them both. The court found, however, that attorney Taylor did not act independently on Baty's behalf, but collaborated with Smith throughout the trial. Decisions on trial tactics were a "joint venture." 661 F.2d at 397. Under those circumstances, the designation of Taylor as "lead counsel" for Baty could not erase the effect of Smith's actual conflict, where Smith continued to represent Baty. Thus here, Doar's association as co-counsel did not "moot" Long's conflict. Unlike attorney Smith in *Baty v. Balkcom*, Long never sought to remove himself as lead counsel for petitioner and Doar, conversely, never purported to assume that role.

that no objection was made to the argument at trial. The fact is, however, that the issue was presented to the trial court on no less than three occasions.[2] That the trial court did not address the issue in its order does not mean that it was not raised.

It is also no answer to state that Long did not object to the solicitor's prejudicial comments or to the questions on direct examination of Moose and Danielson that laid the groundwork for those comments.[3] Petitioner can only be deemed to have waived the objection where his counsel was free to interpose it. But Long, of course, operated under a conflict of interest created by the very fact of his joint representation of petitioner, Moose, and Danielson. Long's failure to object cannot therefore be credited to a tactical decision. *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Estelle v. Williams*, 425 U.S. 501 (1976).[4] He was not free to object to the closing argument or questions without favoring one client over another: if he objected, he would undermine a line of questioning intended to bolster the credibility of Moose and Danielson, who were awaiting sentencing by the trial judge. Long chose not to object and thus cleared the way for

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[2] The issue was presented in the Memorandum in Support of Defendant Hoffman's Motion For New Trial (pp. 46-49), at oral argument on the motion for new trial, and in the Motion to Supplement the Record, TR. 1641-1642.

[3] The questions themselves were not objectionable. *See* ¶ 5, *infra*. Even if they were, however, petitioner cannot be deemed to have waived the objection for the reason stated above.

[4] There is a "deliberate by-pass" of an objection only "[i]f counsel is aware of the facts and the law . . . and yet decides not to object because he thinks the objection is unfounded . . . or for any other reason *that flows from his exercise of professional judgment*. . . ." *Wainwright* v. *Sykes*, 433 U.S. at 99 (emphasis added). It goes without saying that the exercise of professional judgment must not be impeded by a conflict of interest.

the jury to infer that if his clients, Moose and Danielson, were telling the truth, his other client, namely petitioner, was not. Long's failure to object, far from providing reason to deny this petition, is further evidence of the conflict which deprived petitioner of his constitutional right to conflict-free counsel.

5. The Brief in Opposition, at 11-14, further misses the point in arguing that no objection was made to the questions put to Moose and Danielson on direct examination by the solicitor. Petitioner does not challenge the evidence admitted through these questions; indeed, the questions in themselves were not objectionable.[5] His challenge is not to the state's evidence but to the solicitor's closing argument that petitioner was not to be believed because he was represented by the same lawyer who was representing petitioner's accusers. Petitioner underscores the questions asked Moose and Danielson about Long and his joint representation of petitioner, not as an independent basis for reversal, but as proof that the closing argument's spotlight on Long's conflict of interest was not extemporaneous and inadvertent but was a stage direction which the solicitor had carefully rehearsed.

6. The Brief in Opposition does not deny that, to elicit a waiver of the right to conflict-free counsel, the court must advise the defendant both that a conflict may well exist and what the specific dangers of conflict-ridden representation are. The Brief in Opposition attempts to gloss over the fact that the trial court did neither, but only noted features common to multiple defendant trials. The trial court did not advise petitioner that Long had a conflict of interest or that petitioner had a right to conflict-free counsel. And it did not advise petitioner of even one respect in which Long's performance might

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[5] The solicitor elicited that Moose and Danielson had been represented by Long when they plea bargained; were still represented by him; and that Long was also petitioner's lawyer.

be affected by a conflict.[6] It spoke rather of how a *joint trial* might affect the defendants (*i.e.*, they might testify against one another), the jury (*i.e.*, it might return different verdicts), and the judge (*i.e.*, he might impose different sentences). In effect, the Brief in Opposition argues that it is enough that the court implicitly recognized some kind of potential conflict and held some kind of hearing, even though proper questions were not asked to elicit a knowing waiver. What the Constitution requires, however, is "*full warning* by the court of the dangers of such representation." *United States v. DeFillipo*, 590 F.2d 1228, 1240 (2d Cir. 1979), *cert. denied*, 442 U.S. 920 (1979), *quoted in* Br. Op. at 28-29 (emphasis added).[7] That fundamental requirement is not met by an imprecise judicial soliloquy which fails even to address, much less elucidate, the critical choices that faced petitioner.

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[6] The Brief in Opposition, at 29, is simply wrong when it states that the court "specifically discussed with the Petitioner the potential conflicts which could arise . . . ." The Brief, at 17-20, sets forth the colloquy between the trial court and petitioner, and the critical term "conflict" is never mentioned. Nor is any possible effect on Long's performance mentioned.

[7] Indeed, in that case, the Court of Appeals for the Second Circuit noted approvingly that the trial judge had specifically advised the defendants "to review the issue with counsel to make sure that 'he won't be representing one better than the other, and [that] the other won't be prejudiced because of the manner in which the defense will be carried out,'" and had also warned that "'[s]ometimes the assumptions of the lawyer will be so framed it will be prejudicial to one. . . .'" 590 F.2d at 1237 n.15.

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, the writ should be granted and the judgment reversed.

Respectfully submitted,

ROBERT L. WEINBERG *
LAWRENCE LUCCHINO
F. LANE HEARD III
Hill Building
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006
* Counsel of Record

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